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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. [redacted] 15

ARTHUR G. BOGARDUS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 830

ARTHUR G. BOGARDUS,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Mindful that the rules of this Court do not specifically provide for the filing of reply briefs on petitions for writ of certiorari, yet this petitioner respectfully requests that, in view of the fact that the brief submitted by the respondent has cited a Circuit Court of Appeals decision handed down since the filing of the petition herein, and of the further fact that this Court has itself in the interim handed down a decision pertinent hereto (*Helvering* v. *Tex-Penn Oil Company*), this reply brief be received and be considered.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The respondent does not appear to dispute that the decision of the court below is in conflict with the decisions of the Circuit Courts of Appeals for the 3rd Circuit in *Jones* v. *Commissioner,* 31 F. (2d) 755, and *Cunningham* v. *Commissioner,* 67 F. (2d) 205, and for the 9th Circuit in *Blair* v. *Rosseter,* 33 F. (2d) 286.

The respondent attempts to distinguish the 6th Circuit case of *Lunsford* v. *Commissioner,* 62 F. (2d) 740, upon the ground that in that case "the taxpayer had neither been in the employ of nor performed services for the donor" (Br. 9). But the very point of the present case is that it is here stipulated that the taxpayer had never been employed by the donors and had never rendered any services to them (R. 63).

The fact of conflict with other circuits is thus substantially admitted.

As presenting a conflict on a much-debated question, with the 1st, 2nd and 4th circuits ranged on one side, and the 3rd, 6th and 9th on the other, this case appears, therefore, to be a peculiarly appropriate one for grant of the writ of certiorari.

The respondent, although not attempting to distinguish the decisions in the 3rd and 9th circuits, seeks to dispose of them on the grounds, (1) that they were decided before this Court had given the definition of the powers of appellate courts contained in *Elmhurst Cemetery Co. of Joliet* v. *Commissioner,* No. 255, October Term, 1936, decided February 1, 1937, and (2), that one of them was decided before *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716.

The *Elmhurst* case was merely an application of the well-settled doctrine that the Board's findings of fact as to value are conclusive if supported by substantial evidence. More pertinent to the present case is *Helvering* v. *Tex-Penn Oil Company,* No. 207, October Term, 1936, decided March 29, 1937, in which this Court had occasion to point out very clearly the difference between the scope of review of the findings of the Board as to primary, evidentiary or circumstantial facts, and of review of its ultimate findings.

The ultimate finding of the Board in the present case was that the payment was "compensation for personal services" rather than a "gift". This was a finding in the very language of the statute, and constituted, within the meaning of the *Tex-Penn* case, a "conclusion of law, or at least a determination of a mixed question of law and fact". Therefore, it was "subject to judicial review and, on such review, the court may substitute its judgment for that of the board." Therefore the decision of the Court below in this case that the ultimate finding of the Board was conclusive, is in conflict with the decision of this Court in *Helvering* v. *Tex-Penn Oil Company, supra.*

As to the argument of respondent that *Jones* v. *Commissioner,* 31 F. (2d) 755, is not in conflict with the instant case because it was decided before *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, it is sufficient to say that all that the *Old Colony Trust* case decided was that a voluntary payment, *if made for a consideration,* was not a gift. Where a payment is made to persons in whose employment the donor no longer has any interest, there could be no finding of consideration as there was in the *Old Colony* case. In both the present case and the *Jones* case, the payment was made by the former stockholders of a

corporation to employees of the corporation in whose services they no longer had any interest. Indeed, in this case *it is stipulated* that there was no consideration to the donors for the payment (R. 65).

To summarize:

In the light of respondent's brief, it appears that the writ of certiorari should be granted in this case, *first*, to settle a clear conflict between the circuits, and *second*, to resolve what may well be a conflict with the decisions of this Court in the *Tex-Penn* and *Old Colony cases*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 15

ARTHUR G. BOGARDUS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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